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Leif Johan Eliasson

What is at Stake in the Transatlantic Trade and Investment Partnership (TTIP)?

Assessing Challenges and Possible Compromises

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About the author

Leif Johan Eliasson, Ph.D. is Associate Professor at the Department of Political Science, East Stroudsburg University (200 Prospect Street, East Stroudsburg, Pennsylvania, USA). Research areas of interest include European Union integration, structural reforms and Transatlantic relations.

Contact information: Telephone: (570) 422-3250 / E-Mail: jeliasson[at]esu.edu

Preface

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Editor

Lehrstuhl Prof. Dr. Thomas Giegerich
Universität des Saarlandes
Postfach 15 11 50
66041 Saarbrücken
Germany

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A. Introduction

In 2013 the European Union (EU) and the United States (US) began negotiations on the Transatlantic Trade and Investment Partnership (TTIP), the largest trade and/or investment agreement ever attempted. While lowering or removing tariffs (import taxes) is important because consumer goods such as shoes, automobiles, and food still carry high tariffs, various non-tariff barriers (NTBs) constitute greater, and more costly, obstacles for business, and by extension, consumers.[1] NTBs include regulations and rules which directly or indirectly restrict foreign competition by either banning a foreign presence (denying market access) or making it very expensive to compete with nationals. Examples include local product or ownership requirements, limits on business expansion or movement of employees, or limitations on when and how companies can bid for contracts; overlapping or duplicate product testing, inspection, and/or certification requirements in Europe and the US, or restrictions on certain materials and chemicals. All, to varying degree, hamper cross border trade and investments.

TTIP is aimed at removing barriers, promoting regulatory coherence and setting international standards through various degrees of transatlantic convergence, where "Mutual recognition of equivalent norms and regulatory coherence across the transatlantic space….not only promise to improve the lives of [Americans and Europeans], but form the core of broader international norms and standards".[2] If all tariffs were removed, along with half of all NTBs, the boost to both parties would be .6-.8% of GDP annually; the economic benefits for the rest of the world from a TTIP are estimated by the EU Commission at €100bn.[3] There are numerous studies assessing the different economic benefits from various levels of reduced or eliminated tariffs and NTBs, as well as work explaining why TTIP was launched and its initial challenges.[4] However, a central reason for TTIP is that given the size of the transatlantic relationship (€700bn in annual bilateral trade, 44% of global GDP, 32% of trade, and 60% of foreign investments worldwide in 2012), and the importance of respective markets for third parties, agreed standards will become

[1] This research also includes insight gained from several personal discussions with EU and US negotiators, stakeholders, and public officials.

[2] *Hamilton/ Schwartz*, A Transatlantic Free Trade Area - A Boost to Economic Growth?, 2012, p. 4.

[3] EU Commissioner for Trade *Karl de Gucht*, *21* May, 2013; *Erixon/Bauer*, A Transatlantic Agreement: Estimating the Gains from Transatlantic Free Trade in Goods, ECIPE, 4/2010.

[4] F*rancois*, Reducing Transatlantic Barriers to Trade and Investment An Economic Assessment, TRADE10/A2/A16 March 2013,p. 54; *Felbermayr/Heid/Lehwald*, Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal?, Bertelsmann Foundation, June 2013: 19; *Eliasson*, Problems, progress, and prognosis in trade and investment negotiations: the Transatlantic Free Trade and Investment Partnership, JTS 2014.

globally dominant, setting the rules by which others will have to play in order to enter the American and European markets.

Economic benefits notwithstanding, policy makers and legislators assess trade and investment agreements by a different metric. Ideology, possible political bargains, and perceptions among core constituents are crucial, so to better understand what is proposed, as well as the obstacles to an agreement, one must assess institutions, ideas, and cultural influences on TTIP. In this context some EU laws serve to safeguard European preferences; other laws may be modified as a result of TTIP. The two partners have a declared desire to increase transparency in regulatory processes and remove barriers to investments, yet how to achieve this remains unclear, and both have certain issues where progress is essential or an agreement is in jeopardy. For the EU these include greater access to the American public procurement market, retained bans on imports of Genetically Modified Organisms (GMO) crops and hormone treated beef, and recognition of geographic trademarks on food products. For the US they include greater access for American dairy and other agricultural products (including scientific studies as the only accepted criteria for SPS policies), tariff-free motor vehicle exports, and retained bans on foreign contractors in several areas, such as domestic shipping.

This paper begins with a discussion of regulations and rules, and their centrality to TTIP. We thereafter turn to an assessment of progress in three select and controversial sectors, namely agricultural products and food, investments, and data protection. In addition to assessing current progress insight on possible and probable developments is gleaned from examining recent agreements with other developed countries. Europeans and Americans tend to seek FTAs with the same countries and regions, and they have signed three FTAs with other developed, democratic countries (South Korea-EU, KOREU; South Korea-US, KORUS; Canada-EU, CETA) within the past five years. KORUS and KOREU were finalized in 2010 and 2011 respectively, whereas the deal between Canada and the EU was announced in October 2013. As of July 2014 there were several unresolved issues in CETA, so comparisons with this paper rely on summaries released by the parties, leaked documents, public commentaries, and a few personal discussions with officials. Though smaller, these bi-lateral FTAs included tariff elimination on most products (but also retained tariffs and quotas on sensitive products), regulatory cooperation and mutual recognition in several areas, and committees to oversee compliance (including labor standards), and thus should provide some indication of respective side's outer parameters of acceptable compromises, albeit with the understanding that due to the size and attractiveness of their internal markets Americans and Europeans largely had their

own standards accepted in previous bilateral agreements, whereas an agreement between equals, in TTIP, requires far more extensive and difficult compromises.

B. Regulations

Sapir (2006) estimates that the EU and the US together account 80 % of global regulations and rules; if the two could harmonize, or make compatible, a majority of these, it would not only tie the two giants together but also ensure that most countries in the world would adopt the same standards in order to access the EU and US markets.[5] Trade agreements can include agreed processes (e.g. food processing) or outcomes (e.g. led-free toys) in specific sectors, but how those are achieved by either signatory is normally a matter for respective party's legal structure, even if some agreements include an agreed mechanism for ensuring conformity with the set standard. There are also different ways to remove differences between two systems and/or standards. Sector-specific equivalency (the recognition by both sides that two regulations are equivalent in practice) can lead to a Mutual Recognition Agreement (e.g. the 2008 EU-US MRA on Marine Equipment[6]); this in turn can promote further convergence, including a harmonization of conformity assessment (i.e. ensuring that assessments of adherence to standards are the same).

Products and services on either side of the Atlantic are generally of equally high quality and safety standards, and the fastest growing part of trade across the Atlantic is intra-firm. Yet within the same sectors different, and decisively institutionalized, regulations and safety practices endure. Cultural and institutional factors make regulatory compatibility or mutual recognition very sensitive in several areas, e.g. pharmaceuticals, pesticides, audiovisual services, or Sanitary and Phytosanitary measures (SPS; i.e. food safety). Several EU members such as France, Italy, and Portugal, oppose significant changes to SPS measures and in unblocking certain closed professions (notaries, pharmacies, taxis). France secured a "cultural exception'" in the EU Commission's June 2013 negotiating mandate, and reiterated its determination to veto any agreement liberalizing distribution of, or investments in, audiovisual services (which were excluded from KOREU and CETA).[7] The 1920 Jones Act, banning foreign shipping between American ports, is considered a "sacred cow" by trade unions and Democrats in Congress –

[5] *Felbermayr/ Heid/ Lehwald,* fn.3, p. 28.
[6] Mutual Recognition Agreement On Marine Equipment.
United States Coast Guard, http://www.uscg.mil/hq/cg5/cg5214/mra.asp (1/2/1014).
[7] *Fox*, EU-US Trade talks to start after France wins culture clause, *EUObserver*, 2013.

neither NAFTA nor KORUS altered this protectionist legislative tomb.[8] The fragmented American market in services means EU insurance companies are obliged to seek business approval in all 50 American states, and the same applies to most other professional services. The federal government lacks legal authority to compel changes in state procurement policies, making increased access to sub-national public procurement, another pivotal EU goal, very difficult.

In general, and across sectors, the KOREU, KORUS, and CETA all contain commitments to provide national treatments to all goods (similar or substitutable) from the other party, ensure that accreditation and recognition of conformity assessment bodies in the territory of the other party are done on the same terms used domestically, and adhere, at minimum, to the WTO's Technical Barriers to Trade Agreement (TBT).[9] There are general commitments on working together to remove additional regulatory barriers, increase transparency and mutual understanding of respective systems, facilitate access to each other's markets, align regulations with international standards, and identify and promote standards and technical regulations that respect both sides' national laws. Crucially, none of the agreements eliminate all tariffs. Furthermore, specific safeguards (temporarily restricting imports of, or ceasing tariff reductions on, a product) cannot extend beyond two years, nor exceed the lowest tariff of either a) that which is accorded a third party through existing MFN agreements on the same product; or b) the base rates stipulated in respective treaties' annexes. In other words, safeguard measures cannot be used to reverse market liberalization.

At the same time KORUS, KOREU, and CETA contain provisions stating that in areas not covered by the common (internal) European market the EU and its member states can "…maintain or adopt any measures pertaining to […insert service here]," and most member states also declare numerous reservations exempting a country or sector from a treaty's provisions on granting market access to foreign companies and/or providing a foreign company equal treatment to that of a national. Such exemptions can apply across one or more of four modes: cross-border supply, consumption abroad, commercial presence, and the presence of natural persons.[10] Initial proposals reveal TTIP will be no different (e.g. Poland reserves the right to require incorporation of storage and warehouse service providers).

[8] The 'Jones Act' includes the Merchant Marine Act of 1920, 46 App. U.S.C. § 883; the Passenger Vessel Act, 46 App. U.S.C. §§ 289, 292, and 316; and 46 U.S.C. § 12108. Annex 2-A of Free Trade Agreement Between the United States and the Republic of Korea of 30 June 2007 explicitly rejects MFN or national treatment on this issue.

[9] Agreement on Technical Barriers to Trade, World Trade Organization, http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (1/2/2013).

[10] For exemptions in KOREU see Annexes 7-A-4 through 7 D.

Even the staunchest free-trade advocates recognize that not all differences can or should be eliminated, or even coordinated. Regulations often reflect genuinely different constituent preferences and strategies, and serve desired public and social objectives, e.g. on health or financial stability. Still, much regulatory difference between the US and the EU stem not from divergent public policy choices but rather from being devised independently, a lack of transatlantic coordination, and there are many areas with particularly strong potential for some form of coordination, mutual recognition, or harmonization. Compliance costs with American federal laws and EU level regulations are estimated at €50 and €96 bn annually.[11] The prospect of some form of Transatlantic Regulatory Impact Assessment (TARIA) has been raised in negotiations, and one study found that a TARIA just on product safety regulations applied on both sides of the Atlantic would improve real American and European income by .05-.1%, while cutting compliance costs for business.[12]

Efficiency and economic benefits notwithstanding, political, emotional, and ideological factors are always present when public policy reform is raised. Opposition from regulatory authorities and bureaucracies, who for political reasons (power) and self-interest (jobs and resource allocation) oppose change, means "where you sit is where you stand". Similar factors apply to public opinion, where ideological convictions, fear, and lack of knowledge of the complexity of foreign affairs and trade intermingle to produce often irreconcilable demands (e,g. specific protectionism at home while opening markets abroad, or opposition to labor standards even when the other party's standards are higher).[13] Recent surveys found a majority of Americans viewing trade as an economic opportunity, while 35% see them as a threat to jobs; 76% of Americans and 75% of Europeans in early 2014 said they desire closer regulatory integration with the EU/US respectively.[14] Yet dig a bit deeper and one finds that among Americans aged 50 and above (the largest voting block), those lacking a college education, and among trade union members, support for TTIP is well below 50%; one also finds clear European misgiving about US standards on health and food, with over half of Germans opposed to harmonizing EU and US standards. The main benefits of modern trade and investment agreements are difficult

[11] *Dudley/Warren,* Regulators Budget Report, WCEGPP, 2012.
[12] *Morrall*, Determining Compatible Regulatory Regimes between the U.S. and the EU, *US Chamber of Commerce*, 2011,p. 7, 32, 36.
[13] See e.g. Transatlantic coalition rejects anti-consumer trade deal, *Deutsche Welle*, 13 June 2013, http://www.dw.de/transatlantic-coalition-rejects-anti-consumer-trade-deal/a-16874500 (2/2/2014); *Freund*, Encouraging a Manufacturing Renaissance through the Transatlantic Trade and Investment Partnership, PIIE, 2 May, 2014.
[14] Pew Global Attitudes Project, April, 2014,
http://www.pewglobal.org/2014/04/09/support-in-principle-for-u-s-eu-trade-pact (2/5/2014);
German Marshall Fund 2007, www.gmf.org (1/2/2012).

to quantify and explain to a skeptical public, thus leaving policy makers facing communication problems as much as negotiators face technical hurdles.

C. Select Issue Areas Being Negotiated

I. Agriculture and Food

Europeans express high trust in scientific research, yet food, and therefore food safety, is perceived as a large part of culture; its social value far exceeds its nutritional value, and thus culturally rooted relations with food lead to cognitive dissonance vis-à-vis scientific evidence.[15] Many Europeans reject scientific studies which find certain food processes safe if they have long been thought dangerous.[16] The EU's *precautionary principle* – the process of proving a negative, of not allowing anything unless scientifically proven not to be harmful – reflects this approach. Its guiding principles are supposed to be non-discriminatory, and the Commission must use scientific data to evaluate, and continuously re-assess, a product. This does not always occur. Despite inconclusive scientific studies on the safety of products such as meats treated with antimicrobial washes to reduce pathogens, hormone treated beef, and various Genetically Modified Organisms (GMOs) proposed for the EU market, and reports showing no immediate threat to humans, these remain on the EU's list of "unacceptables" (for tariff and quota free entry into the EU).[17] There are 50 GMOs approved for use in the EU, but the approval process is very long, political, and uncertain. A 2014 Commission proposal to amend the existing EU Directive would allow member states to decide which of the approved GMOs to allow domestically, but a country banning a particular GMO cannot prohibit imports of products from other EU states allowing the use of the same GMO.[18] This may provide an opening for compromise in negotiations.

[15] Eurobarometer 63, 2005, p.51.
http://ec.europa.eu/public_opinion/archives/eb/eb63/eb63_en.htm (2/4/2011);
cf. *Kraus*, PIIE, 2 May, 2014.

[16] Pew Global Attitudes Project, 2012, http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/ (2/3/2013).

[17] See e.g. Explanatory Memorandum to accompany the EC Proposal for a Council Regulation implementing Regulation (EC) No 853/2004 of the European Parliament and of the Council as regards the use of antimicrobial substances to remove surface contamination from poultry carcasses, 29/10/2008; Scientific Option of the Panel on Biological Hazards on a Request from DG SANCO on the assessment of the possible effect of the four antimicrobial treatment substances on the emergence of antimicrobial resistance, EFSA Journal 2008, 659, p.1-26.

[18] The amended directive would not impact the assessment process for GMOs conducted.

All Trade Promotion Authority bills introduced in the US Congress since 2011 have recognized countries' rights under the WTO Agreement on the Application of SPS measures to allow certain restrictions based on health concerns, while insisting that all trading partners (read EU) must ensure "…science-based justification be provided for a sanitary or phytosanitary measure if the measure is more restrictive than the applicable international standard [and]…appropriately recognize the equivalence of health and safety protection systems of exporting countries" (read US).[19] The WTO has ruled that the EU ban on hormone treated beef is not based on proper risk assessment, but noted that in the absence of accepted definitions of risk or common international standards for beef it was not strictly illegal or arbitrarily protectionist.[20] Notwithstanding the lack of a uniform definition of protectionism in the WTO, many argue that consumers should be alarmed when domestic industry supports regulations on itself that limit trade.[21]

Concomitantly, due to NTBs American consumers can only buy apples and beef from two EU states, and pay nearly twice as much for European cheese as they would absent tariffs and quotas. The latter are to large extent retaliation for the significant tariffs and regulatory barriers, such as somatic cell count limits (milk quality indicators), costly mandates related to certificate dating, and bans on certain generic food names, faced by American dairy farmers exporting to Europe. Easier access to the US market is evidenced by EU dairy farmers' exports, which amount to 12 times that of their American peers' sales in the EU, thus American farmers hope trade negotiations can pry open EU markets.[22]

KOREU allows agricultural safeguard measures (ASG), tariffs, and tariff rate quotas (TRQs) on "sensitive" products (rice and dairy for Korea; beef, pork, dairy for the EU). It incorporates the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (ASPS), and

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by the European Food Safety Agency under Directive 2001/18/EU of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration OJL 106, 17/04/2001, and Regulation (EU) No. 1829/2003 the European Parliament and of the Council of 22 September 2003on genetically modified food and feed. OJL 268 8/10/2003.

[19] H.R. 3830 Bipartisan Congressional Trade Priorities Act of 2014, introduced 19/1/2014, p. 6-7; cf. also H.R. 6538, To establish trade negotiating objectives with respect to the application of sanitary and phytosanitary measures to agricultural products, and for other purposes, introduced 9/21/2012.

[20] DISPUTE DS26 European Communities — Measures Concerning Meat and Meat Products (Hormones), World Trade Organization, Appellate Body ruling, November 2011, http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds26sum_e.pdf (2/2/2013).

[21] *Watson/James*, Regulatory Protectionism A Hidden Threat to Free Trade, Cato 723, 2013, p. 4.

[22] Dairy Groups Welcome Launch of U.S.-EU Negotiations' National Milk Manufacturing Federation, 30 March, 2013, http://www.nmpf.org/latest-news/articles/dairy-groups-welcome-launch-us-eu-negotiations (1/6/2014).

establishes a committee to work, among other things, on enhancing mutual understandings of procedures and to oversee implementation of the agreement.

KORUS also allows ASG and TRQs to protect Korean and American markets. It incorporates the WTO's ASPS, and establishes a committee to work, among other things, on enhancing mutual understanding of procedures and oversee implementation of the agreement.

CETA incorporates the WTO's ASPS and establishes a committee to enhance mutual understanding of procedures and oversee implementation. There are no changes to the EU's ban on imports of GMOs. Both sides vow to work on establishing equivalencies in each other's inspection and certification systems.

While all three agreements incorporate the WTO's ASPS only CETA went beyond this – a recognition of the greater similarities between the EU and Canada on issues related to food. The US interprets ASPS as allowing practices not acceptable in the EU and Korea, which is a problem for TTIP. Most EU states as well as the EP are highly unlikely to approve imports of poultry, beef, and pork cleaned using prevailing American rules, and non-governmental organizations (NGOs) are opposed to liberalization, worried that the result will be a lowering of EU safety standards. KORUS, KOREU, and CET also exclude the most "contentious" agricultural products. If this applies to TTIP (as it was indicated by the initial texts in May 2014, where both said they were disappointed with the other's offer) the resultant effects on global standards will be that certain agricultural products are always acceptable to exclude from complete tariff elimination based on reasons of "serious domestic interests." Furthermore, given that several leading member of Congress have stated they will not approve a TTIP without significantly improved market access for American meat and poultry, this sector may prove an insurmountable obstacle.

II. Investments

While mutual onshore investments exceed $4trn (2013) – with billions of new investments added each year – European and American companies looking to invest in respective area still face numerous NTBs, including differentiated tax treatments, service sector restrictions, health or technical standards forcing duplication and redundancy in testing, and sector specific prohibitions on foreign ownership.[23] Both have restrictions on foreign ownership in the energy,

[23] See e.g. *Thomsen*, FDI liberalisation in OECD and selected non-member countries: Trends and recent developments' OECD, 2011.
http://www.oecd.org/daf/inv/investmentfordevelopment/46485414.pdf (2/2/2013).

aerospace technology, air transport, and communications sectors. Various EU member states impose additional restrictive policies affecting foreign investors in a variety of fields (e.g. limits on film production and distribution in France, stocks with differentiated voting rights in Germany and Sweden, or liquor monopoly in Sweden). Several member states retain "national champions" in non-defense sectors (agriculture, aerospace, energy, or alcohol), which are effectively off-limits for take-overs; studies have identified numerous steps the EU can take to facilitate trade by focusing on improving airports, shipping ports, the speed of processing paperwork, and improving coordination across member states in for example services and online purchases.[24] The review processes for examining large foreign acquisitions, mergers, and takeovers in the US (the Committee on Foreign Investment in the United States, CFIUS) is lengthy, and costly. The fragmented American market in services means EU insurance companies are obliged to seek business approval in all 50 American states; the same applies to most other professional services.

Both the EU Commission and the US insist on some form of ISDS system which ensures governments can fully legislate and regulate in the interest of its citizens and prevents frivolous suits, while protecting legitimate claims when governments renege on explicit commitments, adopt laws which clearly violate trade agreements, or the state expropriates company assets.[25] Europeans have longstanding experience with ISDS through Bilateral Investment Agreements (BITs). BITs began in Europe after WWII as investors wanted assurances when investing in former colonies, and EU member states have signed 1,400 BITs, compared with the mere 48 signed by the US.[26] EU regulations enable BITs to remain in force (transitionally) under new EU-level bilateral agreements.[27] EU investors use ISDS more than their US counterparts; in 2013 a third of cases filed globally were intra-EU.[28] Yet the vast majority of challenges are launched

[24] *Van der Marel,* Trade and Logistics: A "Bali Package" for the EU, ECIPE Bulletin 1, 2014.

[25] *Oliver/Donnan*, Brussels presses US on bank rules Bloc wants issue on trade pact agenda Stiff resistance from across Atlantic *Financial Times* 2014, p. 2; 'Bipartisan Congressional Trade Priorities Act, fn. 19.

[26] A good history of ISDS is *Lester,* Liberalization or Litigation? Time to Rethink the International Investment Regime, Cato 730, 2013.

[27] Regulation (EU) No. 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.' OJL 351/40 of 20/12/2012.

[28] Recent Developments in Investor-State Dispute Settlement, UNCTAD, No. 1, April, 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (2/5/2014); *Donnan,* France offers trade embrace even as European objections grow, *Financial Times*, 2014, p.3. The following are normally included in BITs. National treatment , MFN, Fair and equitable treatment full protection and security, Transfer of funds, compensation for expropriation, Performance requirement prohibition, Protection of government's rights to regulate in the public interest, Transparency of laws and regulations, Labor and environmental provisions, Right of investor to sue host government, Protection against frivolous cases,

against developing nations' governments, and UN data shows that even if including developed nations investors prevailed in only one third of all cases.[29]

The transatlantic partners have tried to harmonize investment rules. A transatlantic agreement on Regulatory Principles for Trade and Investments in Information and Communication Technology Services with Third Countries was signed in 2011. A year later these principles were extended to all areas of investments in third countries, committing the EU and the US to urge countries with which they sign agreements to adhere to international standards of transparency, equal treatment of foreign and domestic investors, ensure investor capital protections, provide dispute resolutions, and guarantee overall responsible business conduct in conformity with OECD guidelines.[30] Most of the same ideas are promoted for inclusion in the TTIP, and could help the millions of SMEs who create 75-85% of new jobs on both sides of the Atlantic, but often lack the economic resources, know-how, and information about potential partners and foreign markets to benefit from opportunities in the transatlantic market and beyond.

Congress is unlikely to approve any deal without ISDS; every TPA bill presented in congress includes an ISDS. US negotiators also insist that "A comprehensive 21st century trade agreement should include appropriate protections for investors…and that does include ISDS. It is important that these provisions respect national regulatory space and that nothing we do on investor protection interferes with this."[31] The EU Commission notes "…that ISDS until now has led to some very worrying litigation against the state" but insists that an ISDS will both safeguard legitimate European public policy objectives and ensure that European investors are adequately protected from American treaty circumvention such as local favoritism, "padded contracts," and "pork-barrel politics."[32] European consumer groups have awakened over ISDS in TTIP, fearful of American companies suing European governments over legislation the latter consider necessary, such as new environmental laws. On the American side a dominant argument against ISDS is that it provides additional judicial rights and avenues to foreign

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Non-conformity measures, Arbitration (ISDS). Source: *Donnelly*, The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs Conference, CATO, 2014.

[29] UNCTAD, fn 28.

[30] Statement of the European Union and the United States on Shared Principles for International Investment, April 2012, European Commission, http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf (2/3/2013).

[31] US lead negotiator Mullaney in *Fox* 'Germany opposes EU-US investor protection scheme' EUObserver March 15, 2014.

[32] EU Trade Commissioner de Gucht in *Whittington,* Implementing Canada-EU free-trade deal could take another two years, *The Star*, April 24.

entities beyond those available to American companies.[33] To address said fears a suspension of negotiations on this section in order to elicit stakeholder feedback ensued January–June 2014, yet, if anything, this appears to have intensified opposition.[34]

Experienced advisers and free trade advocates remain divided on its merits. Ikenson (2014) argues that investments should always carry certain risks, and ISDS encourages discretionary investments while socializing private risks by having the public pay if the state is successfully sued. ISDS is thus unnecessary regulatory overkill by presuming that governments do not want FDI, will mistreat foreign investors, and that domestic courts are inadequate to cope with legal challenges.[35] Erixon (2014) finds ISDS necessary, because having national courts settle investment disputes means governments must transpose the content of investment-protection into domestic law; most countries' laws generally treat foreign entities differently than national ones, and states can change relevant laws and regulations to fit a political whim.[36] Thies (2013) argues that the Court of Justice of the European Union shies away from interfering with other international institutions and trade organizations because of its concerns with political interference and the potential costs to the EU;[37] not unlike the U.S. Supreme Court and its punting on "political questions", that is, it prefers to leave those questions legislators and policy makers as often as possible. Though rarely discussed publicly, this could strengthen the case for an ISDS.

KOREU covers cross-border provisions of services as well as the liberalization of investment regulations in most sectors short of defense. Most Favored Nation (MFN) treatment applies to all covered investments, and it allows for 100% European ownership in Korean telecommunications and financial services, as well as for complete repatriation of data to national headquarters. There is an extensive ISDS with exclusions for certain sectors, APSA in particular, similar to KORUS.

CETA appears favorable to the EU, as Canada agreed to quadruple the acquisition level under which European companies' takeover bids are treated equivalent to domestic bids (from

[33] See e.g. Friends of the Earth Europe at https://www.foeeurope.org/isds; *Erwin* Trading away Democracy' Foreign Policy in Focus 21 March, 2014.

[34] Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement, EU Commission Press Release, 21 January, 2014 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1015 (3/3/2014).

[35] *Ikenson*, The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs, CATO, 2014.

[36] *Erixon,* Investor-state disputes have put a spanner in the works for TTIP, European Voice, 19 June 2014, p. 4.

[37] *Thies*, *International Trade Disputes and EU Liability*, 2013. The Bernstein exception to the Act of State Doctrine allows judicial rulings if it does not hurt US foreign relations, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

C$344m to C$1.5bn).[38] There is an ISDS applicable to most areas, including SPS measures and financial services, where either side can adopt prudential measures, and allows private challenges against "…regulatory action which does not have a mutually recognised prudential character".[39] The EU Commission expressed contentment with the result, noting that ISDS will not apply to an investment made prior to establishment and that CETA may be a precursor for TTIP, "Given the challenge to reconcile the NAFTA approach with those of the various BIT models already existing in Member States, the outcome presents a well-balanced text, which will stand us in good stead for other negotiations".[40] Then again, the Commission has also noted that each case is different and that "TTIP was a special case", which appears at odds with the goal of setting global standards; ISDS in TTIP ensures the same can be demanded of China in future investment agreements. Conversely, an EU/US failure would undermine joint efforts to ensure players like China abide by international law and adhere to western standards.

III. Data Protection

Data protection is a challenge for business, consumers, and regulators alike. Privacy laws differ, and Europeans (especially consumer groups and the EP) insist on stricter regulations than most American companies, and Congress, consider cost-effective. Notwithstanding the existing EU-US Safe Harbor Agreement (where American companies abide by EU law on the storage and use of personal data), privacy concerns have shot up the ladder in Europe following revelations of NSA spying and American communication companies' cooperation; partly in response the European Parliament adopted the General Data Protection Regulation (GDPR) in March 2014, sending it to the Council for likely approval in late 2014.[41] Intended to simplify regulations through a "one stop shop" while simultaneously strengthening individual citizens' privacy protection, the GDPR excludes small business from most of the requirements, which should be

[38] As a result of Canada's existing FTAs the investment thresholds will rise to the same level for the US, Mexico, and other countries with which Canada has an FTA.
[39] EU-Canada Comprehensive Economic and Trade Agreement Investor-to-State Dispute Settlement. 5 March, 2014,p.7, http://eu-secretdeals.info/upload/2014/02/Investment-in-CETAMarcMaes-S2B-analysis-140306.pdf (3/4/ 2014).
[40] EU Commission, CETA – Summary of negotiating results following the break-through on 18th October.
[41] European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, General Data Protection Regulation (EU) 2012/0011 – C7-0025/2012.

good news for TTIP. Still, studies indicate that many companies find several of its provisions prohibitively expensive and largely unworkable.[42]

In an attempt to stem European criticism of spying the US Attorney General offered a new Data Protection Privacy Agreement with the EU whereby "[…] E.U. citizens would have the same right to seek judicial redress for intentional or willful disclosures of protected information, and for refusal to grant access or to rectify any errors in that information, as would a U.S. citizen under the Privacy Act."[43] The US Congress must approve this agreement in order to amend US law, and EU Foreign Ministers and the Commissioner for Justice remained cautious: "Words only matter if put into law. We are waiting for the legislative step."[44] Adding to the legal uncertainty and privacy concerns are two ground breaking decisions by the Court of Justice of the European Union. In April 2014 an EU Directive requiring private telephone companies to store customer data was invalidated.[45] This directly conflicts with the American approach of requiring private companies to store private communications data. Two months later the court decided that individuals – under certain circumstances – have a right to "be forgotten" on the internet by having links to information removed; multinational internet providers and software companies must now figure out how best to comply, while lawmakers must find new ways to balance practical laws and regulations for business with public concerns about privacy of their data.[46]

D. Conclusion and Prospects

Divergent positions and ingrained preferences will make concluding TTIP difficult. Any agreement will face major opposition from consumer groups, trade unions, and specialty trade groups, all of whom rally voters, and thus indirectly and directly sway the views of legislators. The Democratic leadership in the US Congress supported KORUS in 2006, before turning against it in 2007; they heralded the launch of TTIP as very positive, before turning against TPA, the Transpacific Partnership, and elements of TTIP in 2014. Though Republicans are more pro-trade, many far-right ("tea-party") legislators exude isolationism on all fronts. The EP, armed

[42] *Erixon et al*, The economic importance of getting data protection right: Protecting Privacy, Transmitting Data, Moving Commerce, ECIPE, March 2013.
[43] Department of Justice Press Release June 25, 2014, http://www.justice.gov/opa/pr/2014/June/14-ag-668.html (26 June, 2014).
[44] *Nielsen*, US to extend privacy rights to EU citizens' EUObserver June 26 2014.
[45] ECJ, joined cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, *Digital Rights Ireland Ltd* (C-293/12*) v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others,* Judgment of 4/8/2014.
[46] ECJ, case C-131/12, Google Spain and Google, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*, judgment of 13/5/2014.

with its power to approve trade agreements along with the Council, has not shied from also, albeit informally, exerting influence on the negotiating mandate as well as ongoing negotiations.[47] Though the EP is generally supportive of trade given its centrality in the evolution of the EU, both far-right and environmental parties oppose most aspects of TTIP, and such parties made significant strides in the May 2014 EP elections. Their impact is likely limited in the EP, but in domestic politics these parties may raise public concerns about TTIP loosening regulations in areas on which they ran successful campaigns: labor movement, food regulations, data protection, environmental relations, and thus move certain member state governments to adopt a tougher stance on TTIP. Prior to TTIP negotiations in 2012 America's largest union (AFL/CIO) expressed cautious support for a deal, only to express serious concerns about TTIP and jobs in 2014. European trade unions and consumer groups express similar fears, and are organizing extensively on the full range of issues covered by TTIP.[48]

As basic negotiation theory shows, if the range of participating parties' minimally acceptable outcome fail to overlap there is no possibility of reaching a mutually acceptable agreement.[49] In KORUS, KOREU, and CETA, both the EU and the US used their size and attractiveness to extract greater concessions from and reforms in the other signatory, moving them to accept EU/US positions, resulting in (a) longer transition periods with higher retained tariffs on imports during those transitions; (b) greater recognition of their own standards and greater access to the other's markets; (c) exclusion of goods and services they wanted to protect (e,g, domestic shipping in the US and GMOs and audiovisuals in the EU). But all three agreements are all very similarly structured. TTIP, which is meant to match and exceed these agreements, could include mutual recognition and equivalency clauses (e.g. Canadian and US auto parts in CETA) which would allow Canada and Korea to accede relatively easily, thus quickly broadening TTIP's global application to four parties and over 900 million people. However, as these (and many other agreements) show, complete harmonization of regulations and rules between governing entities occurs infrequently, and convergence is even rarer (the process of converging US and European accounting standards ran over a decade, with joint processes of revenue recognition coming after 12 years of talks).

Officials on both sides of the Atlantic privately acknowledge that they neither expect, nor see the necessity of, total agreement in all areas. Instead they aspire to achieve as broad an agreement

[47] Van den Patte/ De Ville/ Orbie, The European Parliament's New Role in Trade Policy: Turning power into impact, *CEPS* 89, 2014.

[48] Multiple NGO representatives at a conference on ISDS in TTIP, I attended organized by TACD, Washington DC June 24, 2014.

[49] *Fisher/Ury/ Patton, Getting to Yes: Negotiating Agreement Without Giving In*, 1991.

as possible, and to use this as a basis on which to subsequently pursue harmonization or convergence; a so-called “living agreement” which can be continuously modified. This idea faces serious American congressional opposition, with threats of “pulling the plug” if negotiations appear headed towards a watered-down agreement. Whether this is a strategy aimed at eliciting concessions remains to be seen. What is clear is that TTIP will require unprecedented mutual accommodation, where finding overlap in respective actor’s range of acceptable outcomes will prove more challenging than anything previously encountered.

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